No. 89-1576

In the Supreme Court of the United States

OCTOBER TERM 1989

THE TRAVELERS INDEMNITY COMPANY,
Petitioner,
-vs.-
AVONDALE INDUSTRIES, INC. and
OGDEN CORPORATION,
Respondents,
-and-
COMMERCIAL UNION INSURANCE COMPANY,
HIGHLANDS INSURANCE COMPANY, AMERICAN
MOTORISTS INSURANCE COMPANY, and NATIONAL
UNION FIRE INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD S. FELDMAN
Counsel of Record for Respondent
Commercial Union Insurance Company
RIVKIN, RADLER, BAYH, HART & KREMER
E A B Plaza
Uniondale, New York 11556-0111
(516) 357-3000

David P. Franks
Emily H. Levin
Of Counsel

Virgil Mountain, Inc. (212) 779-4046 (L1346)

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This brief is respectfully submitted by respondent Commercial Union Insurance Company ("Commercial Union") in opposition to the petition for a writ of certiorari filed by Petitioner The Travelers Indemnity Company.[1]

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[1] Pursuant to Rule 29.1 of the Supreme Court Rules, Respondent Commercial Union states that it is a wholly owned subsidiary of Commercial Union Corporation, a Delaware holding corporation.

STATEMENT OF THE CASE

A. Commercial Union's Position

Respondent Commercial Union respectfully submits that this Court should not review the Court of Appeals' affirmance of the District Court's Fed. R. Civ. P. 54(b) certification of its determination that Petitioner was obligated to defend Plaintiffs-Respondents under certain contracts of insurance.

Petitioner's objection to the District Court's Rule 54(b) certification was not raised to the District Court. Therefore, the issue should not be reviewed by this Court.[2]

B. Facts of Record

Plaintiffs-Respondents moved before the District Court for partial summary judgment declaring that Petitioner was obligated under its insurance contracts to defend them against certain claims.

No other motion was made.

Petitioner opposed the motion on the basis of certain provisions in the insurance contracts, including the "other insurance" provision. Under the "other insurance" provision, Petitioner argued that its coverage was "excess" to the coverage available to Plaintiffs-Respondents under other insurance contracts, namely, those issued by certain of the third-party defendants, including Respondent Commercial Union, who were sued by Petitioner for contribution

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[2] Respondent Commercial Union takes no position on any other issue presented in the petition.

as the subrogee of the insured Plaintiffs-Respondents.

The District Court rejected Petitioner's "excess" insurance argument, stating:

> Lastly, the defendant argues that it is an excess insurer, and that other insurers are primary insurers for these actions. Thus, the defendant contends it is not obligated to provide the plaintiffs with a defense.
>
> This objection is without merit. The CGL policies state that "if any insurer affording other insurance to the named insured[s] denies primary liability under its policy, [Travelers] will respond under this policy as though such other insurance were not available." *E.g.*, Ex. G to Affidavit of Robert P. Carroll, executed Oct. 28, 1987, at Condition 5. The third-party defendants, other insurers named by the defendant, have all denied primary liability. According to its contract, these denials obligate the defendant.

(Pet. at A-45)

No further argument was made by Petitioner in opposition to Plaintiffs-Respondents' subsequent Rule 54(b) certification motion.

Not until it reached the Court of Appeals did Petitioner raise an issue that was based upon a further clause in the "other insurance" provision. Pursuant to that clause, the insured Plaintiffs-Respondents were required, as a condition of coverage by Petitioner's policies, to do "all things necessary to enforce

such [Petitioner's subrogation] rights." (Pet. at 18–19) Petitioner took the position in the Court of Appeals that final judgment declaring coverage could not properly be awarded because the District Court had not made a finding of fact on whether that subrogation condition had been met. Whether the insured Plaintiffs-Respondents had met the subrogation condition was, according to Petitioner, factually linked to its third-party action, in which certain third-party Defendant-Respondent insurance carriers had denied coverage, *inter alia*, for failure of the Plaintiffs-Respondents to submit to them timely notice of claims for defense and indemnity coverage.

The Court of Appeals overruled Petitioner's argument, stating:

> [Petitioners] Travelers has also raised the question of indemnification or contribution from other insurers arguing that it is an excess carrier with respect to at least two other insurers. The district court did not rule on this issue, only requiring Travelers to defend. As [Plaintiff-Respondent] Avondale had the clear right to choose which insurance company it would name as a defendant, regardless of whatever rights Travelers may have to demand defense costs from the other carriers, we need not and do not on this appeal adjudicate Travelers' rights against the third-party defendants.

(Pet. at A21–22)

This petition for certiorari was filed after the Court of Appeals denied Petitioner's request for a rehearing.

SUMMARY OF ARGUMENT

Petitioner cannot seek review of a Rule 54(b) certification in the main action on the ground that full and final resolution of the claim necessarily depends upon adjudication of the third-party action, when the issue allegedly common to the main and third-party actions was not raised by Petitioner in the District Court in opposition to the summary judgment and Rule 54(b) motions leading to such certification.

ARGUMENT

PETITIONER HAVING FAILED TO RAISE ITS RULE 54(B) CERTIFICATION ARGUMENT TO THE DISTRICT COURT, REVIEW BY THIS COURT IS UNWARRANTED

Review of the District Court's Rule 54(b) certification affirmed by the Court of Appeals is sought because the adjudicated claim in the main action allegedly depends "necessarily" upon resolution of the third-party action. Questions Presented, No. 1 (Pet. at i) That Question is erected wholly upon the subrogation-impairment issue. Petitioner erroneously suggests that it raised its subrogation-impairment issue before the District Court. (Pet. at 19–20, 21) The record before the District Court is barren of any such issue.

Whatever other issues Petitioner raised in opposing the Plaintiffs-Respondents' summary judgment

and Rule 54(b) certification motions,[3] Petitioner neglected or elected not to argue that Plaintiffs-Respondents had failed to comply with the subrogation condition for coverage under their insurance contracts with Petitioner.

Hence Petitioner waived and abandoned the issue. *See Liberles v. County of Cook*, 709 F. 2d 1122, 1126 (7th Cir. 1983) ("It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."); *Tarpley v. Greene*, 684 F. 2d 1, 7 n.16 (D.C. Cir. 1982) ("We find it unnecessary to decide now whether the answers were properly before the District Court because we agree that, having never brought the answers to the attention of the District Court in opposing appellees' motions for summary judgment, appellant cannot rely on them on appeal to obtain a reversal."); *Franz Chemical Corp. v. Philadelphia Quartz Co.*, 594 F. 2d 146, 150 (5th Cir. 1979) ("It is almost axiomatic that any genuine issue of fact must somehow be shown to exist at the district court level. Where the moving papers do not reveal the presence of a factual controversy and the opposing party manifests silent assent through

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[3] Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

inaction, the opposing party will not thereafter on appeal be heard to belatedly assert as grounds for reversal that some factual disputes implicit in the underlying arguments have yet to be resolved."); *Donnelly v. Guion*, 467 F. 2d 290, 293 (2d Cir. 1972) ("If, indeed, evidence was available to underpin her conclusory statement, Rule 56 required her to come forward with it. A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried."); *Edward B. Marks Music Corp. v. Continental Record Co.*, 222 F. 2d 488, 492 (2d Cir. 1955), *cert. denied*, 350 U.S. 861 (1955) ("But a plaintiff in his opposition to a motion for summary judgment cannot abandon an issue and then, after an unpalatable decision by the trial judge, on appeal, by drawing on the pleadings resurrect the abandoned issue.").

It is thus disingenuous for Petitioner to accuse the lower courts of ignoring the subrogation-impairment issue. As Respondent Commercial Union noted at page 1 of its brief to the Court of Appeals, "Travelers attacks the judgment of the District Court on the ground that it required findings of fact regarding subrogation rights provided to Travelers *on a record that contained no evidence or arguments addressing this issue.*" (Emphasis supplied.)

Inasmuch as Petitioner failed to raise its subrogation-impairment issue in the District Court, and the lower courts did not determine any issues in the third-party action, Petitioner cannot now properly seek review by arguing that the challenged judgment

declaring its duty to defend Plaintiffs-Respondents "necessarily" depends on the resolution of certain third-party defenses such as defective notice of claim. (Pet. at 1, 2, 9, 14, 17 and 21) Having neglected or elected on both the summary judgment and Rule 54(b) certification motions not to put before the District Court the subrogation-impairment issue it belatedly claims is common to both the main and third-party actions, Petitioner charted its own procedural course and cannot at this late date ask this Court to intervene in the case to relieve Petitioner of the entirely predictable consequences of its litigation tactics.

The rule is well settled that:

> Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362–363, n.16 (1958). .. Its usual formulation is: "It is only in *exceptional* cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927)."

Youakim v. Miller, 425 U.S. 231, 234 (1976) (emphasis supplied).

There is nothing extraordinary in the record or the lower courts' decisions respecting Petitioner's untimely raised objection in this case to the Rule 54(b) certification. Review by this Court is unwarranted.

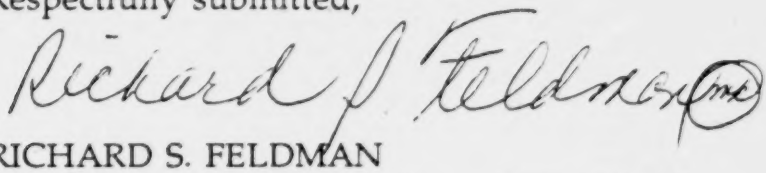
Therefore, the petition should be denied.

CONCLUSION

The main action's subrogation-impairment issue belatedly raised to this Court in connection with the third-party action was not raised in opposition to the summary judgment and Rule 54(b) certification motions before the District Court, and neither the District Court nor the Court of Appeals addressed the issue. Therefore it is not properly reviewable. For this reason, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be denied.

Dated: Uniondale, New York
May 9, 1990

Respectfully submitted,



RICHARD S. FELDMAN
Counsel of Record for Respondent Commercial Union Insurance Company
RIVKIN, RADLER, BAYH, HART & KREMER
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